OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 91-3 May 9, 1991

TO: All Regional Directors, Officers-in-Charge, and Resident Officers

FROM: Jerry M. Hunter, General Counsel

SUBJECT: Guidelines Concerning Application of Health Care Rule (29 CFR Part 103, 54 FR No. 76, 284 NLRB 1580)

I. Introduction

On April 21, 1989, the Board issued its Final Rule on Collective Bargaining Units in the Health Care Industry. The Rule was to become effective on May 22, 1989, but was enjoined by the U.S. District Court for the Northern District of Illinois. As a result of the injunction, the Acting General Counsel circulated a memo to the Regional Offices (GC 89-7 dated May 30, 1989) informing them that they were to continue processing election petitions under current case law in cases involving acute-care facilities, but to suspend processing of cases pending further notice if the outcome would be decided differently under the Rule than under St Vincent Hospital, 285 NLRB 365 (1987) (separate units for RNs, doctors, skilled maintenance employees, or business office clericals) and the Region could not secure a stipulation to the unit. On April 11, 1990, the Seventh Circuit, on appeal, reversed the District Court and found the Board's Rule to be valid. However, the Seventh Circuit stayed the effect of its Order. The Supreme Court accepted certiorari and on April 23, 1991, affirmed the Circuit Court decision. You will be advised shortly as to the Rule's effective date.

The Rule itself, and the various Notices of Proposed Rulemaking leading up to the Rule, are published in full in 284 NLRB 1515 to 1597. All Regional personnel should, as soon as possible, familiarize themselves with all aspects of the Rule. Each Regional Office should undertake training sessions with respect to the Health Care Rule. However, in order to assist the Regions in their processing of these cases and in their training programs we provide you with the following summary.

II. Contents of the Rule

A. The Rule is applicable only to "acute-care hospitals."

1. Hospital is defined in the same manner as defined under Medicare (currently 42 U.S.C. 1395x(e) (as revised 1990) attached).

2. Acute-care hospital is either:

    a. a short term care hospital in which the average length of patient stay is less than 30 days; or

    b. a short-term care hospital in which over 50 percent of all patients are admitted to units where the average length of patient stay is less than 30 days.

        (1) The average length of stay shall be determined by reference to the most recent 12-month period preceding receipt of a representation petition for which data are readily available.

3. The term acute-care hospital shall include those hospitals operating as acute-care facilities even if those hospitals provide such services as, for example, long term care, outpatient care, psychiatric care, or rehabilitative care (see 4, following).

4. The following are excluded from the definition of acute-care hospital:

    a. facilities that are primarily nursing homes.

    b. facilities that are primarily psychiatric hospitals.

        (1) Psychiatric hospital is defined in the same manner as defined in the Medicare Act (currently in 42 U.S.C. 1395x(f) attached).

    c. facilities that are primarily rehabilitation hospitals.

        (1) The term rehabilitation hospital includes and is limited to all hospitals accredited as such by either the Joint Committee on Accreditation of Healthcare organizations (JCAHO) or by the Commission for Accreditation of Rehabilitation Facilities (CARF).

5. The Board may presume that an employer is an acute-care hospital where, after issuance of a subpoena, the employer does not produce records sufficient for the Board to determine the facts.

B. In acute-care hospitals, the following shall be appropriate units, and the only appropriate units, for RC and RM petitions (see exceptions in “C” below):

    1. All registered nurses.

    2. All physicians

3. All professionals except for registered nurses and physicians.

4. All technical employees.

5. All skilled maintenance employees (generally includes all employees involved in the maintenance, repair, and operation of the hospital's physical plant systems, as well as their trainees, helpers, and assistants). Classifications which should generally be included in such units are carpenter, electrician, mason/bricklayer, painter, pipefitter, plumber, sheetmetal fabricator, automotive mechanic, HVAC (heating, ventilating, and air conditioning) mechanic, maintenance mechanic, chief engineer, operating engineer, fireman/boiler operator, locksmith, welder, and utility man (53 FR No. 170, pp. 33923-24, 284 NLRB at 1561-62).

6. All business office clerical employees.

7. All guards.

8. All nonprofessional employees except for technical employees, skilled maintenance employees, business office clerical employees, and guards.

C. Exceptions

1. Combined units.

a. If sought by labor organizations (not employers) various combinations of the eight units set forth above, may also be appropriate. See 53 FR 33932, 284 NLRB at 1573. See also 54 FR 16348, 284 NLRB at 1597. Appropriateness of particular combinations will be decided in each case by adjudication, except that the Board has stated some combinations (e.g., "all professionals," or "all nonprofessionals") are obviously appropriate (53 FR 33932, 284 NLRB at 1573).

2. Existing nonconforming units.

a. The Rule is aimed at initial organizing at acute-care hospitals. Where there are already existing units, the Board contemplates that they will fall into two categories:

(1) Existing units in conformity with the Rule (either one of the eight listed above or a combination among those eight units). In such a case, new petitions should be in conformity with

the Rule.

(2) Where there are existing nonconforming units, there cases will decided by adjudication; the Board will find appropriate only units which comport, insofar as practicable, with the eight appropriate units or appropriate combinations thereof.

3. Residual units. The board left for adjudication the issue of the continuing viability of Levine Hospital of Hayward, 219 NLRB 327 (1975), (53 FR 33930, 284 NLRB 1570-71).

4. Stipulations.

a. The Board will approve agreements providing for elections in one of the eight units listed above.

b. Where parties stipulate to a unit which is not one of the eight units, but is rather some other unit, nothing shall preclude Regional Directors from approving stipulations, as long as the stipulated unit does not violate any express statutory provision or established Board policy other than its rule on collective-bargaining units in the health care industry (53 FR 33931-32, 284 NLRB at 1572-73, Otis Hospital, 219 NLRB 164 (1975) remains applicable).

5. Extraordinary circumstances.

a. Where extraordinary circumstances exist, the Board shall determine appropriate units by adjudication, to avoid “accidental or unjust application of the rule.”

b. A unit of five or fewer employees is automatically considered an extraordinary circumstance.

c. Extraordinary circumstances are to be narrowly defined. The arguments raised in the course of the rulemaking proceedings, including but nor limited to those listed below, alone or in combination, even in situations in which such variations may be highly unusual, normally shall not constitute an extraordinary circumstance justifying an exception to the rule.

(1) Diversity of the industry, such as size of institution, variety of services offered, or staffing patterns.

(2) Increased functional integration of, and a higher degree of work contacts among, employees as a result of multicompetent workers, “team” care, and cross training.

(3) Impact of nationwide hospital chains.

(4) Recent changes within traditional employee groupings and professions; for example, increased specialization among RNs.

(5) Effects of various governmental and private cost-containment measures.

(6) Single institution occupying more than one contiguous building.

d. A party urging "extraordinary circumstances" bears a "heavy burden" to demonstrate that its arguments are substantially different from those which have been carefully considered at the rulemaking proceeding, as, for instance, that there are such unusual and unforeseen deviations from the range of circumstances already considered that it would be "unjust" or "an abuse of discretion" for the Board to apply the rule to the facility involved (53 FR 33933, 284 NLRB at 1574).

D. The following issues involving acute-care hospitals are still to be decided by adjudication.

1. Unit placement.

a. The Rule does not determine the placement of employees in specific units, but leaves that to determination by adjudication.

2. Decertification petitions.

a. Continue to apply Campbell Soup Co., 111 NLRB 234 (1955), i.e., petition must be for an established unit. Technically, decertification petitions under 9(c) (1) (A) (ii) are not covered by the Rule. See 53 FR 33930, 284 NLRB at 1570, for explanation.

E. Cases involving health care facilities that do not fall within the Rule's definition of acute-care hospitals shall continue to be decided by adjudication.

III. Procedure to be Followed Upon Receipt of RC or RM Petition

A. The Rule is set forth at 54 FR No. 76 pp. 16347-48 (284 NLRB at 1596-97). Detailed explanations regarding each segment of the Rule are found in the Second Notice of Proposed Rulemaking, 53 FR No. 170 (9/1/88) pp. 33900-35

(284 NLRB at 1528-78), and in Final Rule, 54 FR 16336-47 (284 NLRB at 1580-1596).

B. Upon receipt of an RC or RM petition involving health care facilities (note: the Rule does not apply to RD petitions):

1. Prior to initial contacts with parties, the Board agent should review definitions to determine whether the petition is governed by the Rule. If the petition is governed by the Rule, standard representation casehandling procedures still apply unless superseded by the Rule.

2. The Board agent should advise the parties of the Rule.

3. With regard to whether the facility is an acute-care hospital, in the normal case it will be obvious. Stipulations on this issue should usually be obtainable.

4. If there is disagreement as to whether the health care facility is an acute-care hospital, the employer should be apprised that, since it has control of the records, it will have the burden, upon issuance of subpoena if necessary, of coming forward at the hearing with facts to enable the Board to decide this issue (54 FR 16344, 284 NLRB at 1591-92). See Tropicana Products, Inc., 122 NLRB 121 (1958).

   a. Employer may voluntarily produce these facts.

   b. If not, the Board agent should refer to the definition of "hospital" in the Medicare Act, and of "acute care" in the Rule; §103.30 (f) (2) (54 FR 16348, 284 NLRB at 1597). The Region should subpoena employer's books and records necessary to show at the hearing whether the facility meets the definition of acute-care hospital--a short-term care hospital in which the average length of patient stay is less than 30 days or in which over 50 percent of all patients are admitted to units where the average length of patient stay is less than 30 days. Determine the average length of stay by referring to the most recent 12-month period preceding receipt of a representation petition for which data are readily available.

   c. The facility is not an acute-care facility under the Rule if it is primarily a nursing home, primarily a psychiatric facility, or primarily a rehabilitation hospital. To determine if the facility is a psychiatric hospital, consult attached Medicare definition. To determine whether the facility is a rehabilitation hospital, check whether it is accredited by either the JCAHO or CARF (see 103.30 (f)(3) and (4)).

d. If, after subpoena, the employer does not supply sufficient facts to enable the Board to make a determination, the Board will presume that the facility is an acute-care facility.

5. If the case involves other than an acute-care hospital, the Region is to proceed in the normal manner, by stipulation or adjudication.

6. If the case involves an acute-care hospital, check whether the petitioned for unit is for more than five employees. A requested unit which conforms to the units set forth in the Rule but which nonetheless contains five or fewer employees is considered an extraordinary circumstance, and its appropriateness must be resolved by stipulation or adjudication.

7. If for more than five employees, see if the petition conforms to the units in the Rule. Encourage parties to stipulate to one of the eight units. The Board will approve consent agreements for elections in the eight units.

8. If a petitioning union is contending for a unit different from the eight established in the Rule, determine the basis for the position.

   a. Combination units - if sought by union, a combination of some of the units may be appropriate.

   b. Existing units.

      (1) Where the existing units conform to the eight established units in the Rule, the petitioned for new unit should conform to the Rule.

      (2) Where the existing units do not conform, proceed by adjudication or stipulation. The unit sought should comport, insofar as practicable, with units established by the Rule (see “c” below).

      (3) Where the unit requested is residual to an existing, nonconforming portion of one of the eight appropriate units proceed by adjudication, if no stipulation can be obtained. The Board will decide the continuing viability of Levine Hospital of Hayward, 219 NLRB 327 (1975); (53 FR 33930, 284 NLRB 1570-71).

   c. Stipulation. The Regional Director may approve a consent agreement for a combination of the eight units. In addition, nothing precludes the Regional Director from approving a stipulation not in accordance with the eight units, as long as the stipulation is otherwise “acceptable.” (i.e., does not “violate any express

statutory provision or established Board policies other than the Rule." 53 FR 33931, 284 NLRB at 1572. Examples would be: guards being placed in units with nonguards; supervisors or managers being included in units, etc.)

d. Extraordinary circumstances. This provision is to be narrowly construed. Apprise the party claiming extraordinary circumstances of the Board's determination that a number of circumstances (set forth in Second Notice, 53 FR at 33932, 284 NLRB at 1573-74) are not considered extraordinary.

Note: If none of the above exceptions appears to apply, the Region should consider dismissing the petition administratively, i.e., without a hearing.

C. Hearing

1. A hearing will be held if parties do not execute a stipulation or consent agreement form approved by the Region, and the petition is not dismissed for administrative reasons.

2. Issues to be determined.

a. Acute-care hospital.

(1) Is the facility a hospital?

(2) Is there a sufficient number of its patients receiving acute care?

(3) Is the facility primarily a nursing home, psychiatric hospital or rehabilitation hospital?

(4) If records have not been previously subpoenaed by the Region, they should now be subpoenaed. The Board will presume the facility is an acute-care hospital if the material provided by the employer in response to the subpoena is not sufficient to allow the Board to make a determination.

b. The appropriateness of a unit of five or fewer employees.

(1) Consider the Board's concern with proliferation of units, and other considerations. See 54 FR 16341-42, 284 NLRB at 1587-88.

c. Existing nonconforming units.

(1) A number of issues may arise in this area. The hearing officer may need to elicit evidence which will enable the Regional Director to determine whether, where the existing units are smaller than those encompassed by the Rule, an incumbent or a nonincumbent may petition for a residual unit. The Regional Director may ultimately need to address the continued viability of Levine Hospital, 219 NLRB 327 (1975).

(2) The Regional Director is to view requests for nonconforming units in light of the Board's concern with proliferation, as well as the other considerations set forth in the Rule and Supplementary Information.

d. Extraordinary circumstances.

(1) The party arguing that the case raises an extraordinary circumstance should normally make an offer of proof. In determining whether to accept the offer, the hearing officer should be familiar with those arguments, which the Board has said, it will not consider extraordinary circumstances, alone or in combination. See, e.g., 53 FR 33932-33, 284 NLRB at 1573-75; 54 FR 16344-45, 284 NLRB at 1592-93. The hearing officer will then either permit the requested evidence to be adduced or refer the issue to the Regional Director and, if requested, ultimately to the Board for ruling.

(2) The extraordinary circumstances exception is to be narrowly construed. Extraordinary circumstances exist only where a hospital is shown to be uniquely situated such that application of the Rule would be unjust or an abuse of discretion.

3. Addressing nonunit scope issues.

a. Of course, absent stipulation, hearings will need to be held to resolve disputed issues other than unit scope such as:

(1) The placement of employee classifications within the appropriate unit. During the rulemaking proceeding, disputes arose regarding the unit placement of several categories of employees: for example, the nurse anesthetist (RN or physician unit), respiratory therapist (professional or technical unit), medical technologist (professional or technical unit), ward clerk (technical or service and maintenance unit). Questions also arose as to the

placement of dual function employees (54 FR 16340, 284 NLRB at 1586). Disputes over these and other classifications may arise in the future.

(2) Supervisory and managerial status.

(3) Contract bar.

(4) Labor organization status.

(5) Single facility appropriateness.

(6) Eligibility issues, etc.

If you have any questions regarding this memo, please contact your Assistant General Counsel.

/s/
Jerry M. Hunter

Attachment Not Included – See 42 U.S.C. § 1395x. Definitions

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